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10/722,878	11/26/2003	Claudia Pinzon	682.0043USU1	1663

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EXAMINER

OGDEN JR, NECHOLUS

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/722,878
Filing Date: November 26, 2003
Appellant(s): PINZON ET AL.

MAILED
DEC 21 2007
GROUP 1700

Charles N. J. Ruggiero
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 5, 2007 appealing from the Office action mailed August 18, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dufay et al (2002/0010114).
2. Dufay et al disclose a water-based personal cleansing composition comprising 20 to 40% of a fatty acid alkyl ester; 5 to 20% of an emulsifier; 5-20% by weight of a refatting agent; 1-15% by weight of a polyol and quantities of water add up to 100% and optionally other auxiliaries and additives (0051-0056). Dufay requires emulsifiers, which include nonionic surfactants in said personal cleansing compositions, wherein said nonionic surfactants include ethoxylated alcohols, oligoglycosides, wool wax alcohols and polyalkylene glycols (0011-0026). Dufay et al further teach that said emulsifier may include zwitterionic surfactants and amphoteric surfactants (0033). With respect to the auxiliaries and additives, Dufay et al teach that anionic surfactants may be included in amount from 1 to 70% by weight of the composition(col. 4, 0060-0061). With further respect to the wax component of the claimed invention, Dufay et al teach that said auxiliary or additive includes fats and waxes such as candelilla, paraffin, carnauba wax, beeswax, hydrogenated castor and jojoba wax (col. 5, 0064); and the balance being water for cleansing compositions (col. 4, 0051-0056). Note, Dufay et al teach that said auxiliary additives are present in an amount from 1 to 50% by weight (0141).
3. Dufay et al is silent with respect to the viscosity of the composition, however, it would have been obvious to one of ordinary skill in the art to combine the components in their requisite proportions to encompass the claimed viscosity given that each of the

same components are taught and required for the purpose of producing emulsions and/or droplets or dispersions. Therefore, absent a showing to the contrary, the viscosity limitation would have been prima facie in view of the teaching of Dufay et al given that Dufay et al teach a personal or topical composition that includes emulsifiers such as anionic, nonionic and amphoteric surfactants and waxes as claimed.

(10) Response to Argument

Appellant argues that the prior art, Dufay et al, do not teach or suggest the claimed invention because it does not provide any motivation to pick or choose the essential ingredients as claimed but instead list the components as merely optional ingredients and are not disclosed in working examples.

The examiner contends and respectfully disagrees because appellant's invention is drawn to a broad list of surfactants and waxes, which can encompass a number of possibilities (see claim 1). Dufay et al require a nonionic emulsifier/surfactant and states that anionic surfactant are optional well-known surfactants as well as waxes that may be employed in the personal topical cleansing compositions of Dufay et al. With respect to picking and choosing, it is established that the office has presented a case of prima facie obviousness, wherein it is admitted that Dufay et al do not teach with sufficient specificity to anticipate the claims that would establish a statutory bar.

However, the skilled artisan would have been motivated to pick a wax, anionic and an essential nonionic surfactant to encompass the claimed invention, absent a showing to the contrary, since these ingredients are well known in personal cleansing topical compositions. Accordingly, it is held that "A reference may be relied upon for all that it

would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments". Merck & Co. v. Biocraft Laboratories, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not. See KSR Int'l Co. v. Teleflex Inc., 550 U.S. ___, 2007 WL 1237837, at *12 (2007) ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.").

Appellant argues that Dufay et al makes no mention of any amount of wax, or properties of waxes and viscosity ranges.

The examiner contends that Dufay et al clearly suggest that auxiliaries and additives are employed in amounts from 1 to 50% (0141). With respect to the melting point of waxes, the examiner contends that Dufay et al list many of appellants preferred waxes wherein those waxes would comprise similar properties in the absence of unexpected results. With respect to the viscosity, the examiner contends that said viscosity would have been obvious to the compositions of Dufy et al in the absence of a showing to the contrary given that Dufay et al teach personal topical composition with similar ingredients wherein it would have been obvious to encompass said viscosity by optimizing ingredients, in the absence of unexpected results.

Appellant argues that Dufay et al discloses an emulsion but does not disclose a dispersion even-though it is mentioned in the background of the invention.

The examiner contends that the background establishes the need for the dispersion of oil droplets (0002) and that the needs are met by Dufay et al by establishing emulsion properties and emulsifiers are required as essential ingredients (0004-0011) and including droplets which ultimately are dispersed in said emulsion composition. Moreover, applicant has not established any criticality commensurate in scope with the claimed invention that would distinguish the claimed invention from the prior art of record and the examiner asserts that said compositions would have been similar in form given that the same or similar components are employed.

Appellant argues that the claimed composition "affords surprising performance advantages not contemplated by Dufay".

The examiner asserts that appellants surprising advantages are mere statements and are insufficient to overcome a prima facie case of obviousness.

4. Appellant argues that one of ordinary skill in the art would not look to Dufay et al since Dufay et al may be used to cleanse other surfaces other than skin or personal applications.

5. The examiner contends that said claims are only described as "topical" and this broad language may be interpreted to include many surfaces. Also, Dufay et al teach appellant's preferred use as a topical skin cleanser. Accordingly, it is held that intended use of a composition is given little weight in patentability determination.

6. Appellant argues that there is no indication that one wax would be suitable over another for the purpose of providing effective cleaning, replenishment, protection.

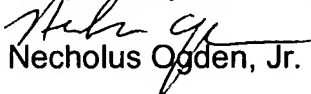
7. The examiner contends, as stated by appellant, waxes having high melting points are listed by Dufay et al, therefore, the examiner contends that in the absence of a showing to the contrary, one of ordinary skill would assume that waxes would perform in similar manner given that are the same component.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Necholas Ogden, Jr.

Conferees:


Harold Pyon


Greg Mills